Supreme Court, U.S.
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No. 98-822

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

FRIENDS OF THE EARTH, et al.,
Petitioners,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF

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TABLE OF CONTENTS

Page

REASONS FOR GRANTING THE PETITION 1

APPENDIX

BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN RESPONSE TO VALLEJO'S MOTION TO DISMISS PLAINTIFF'S CIVIL PENALTY CLAIMS 1a

AFFIDAVIT OF BRUCE J. TERRIS 32a

TABLE OF CASES AND AUTHORITIES

Cases **Page**

Atlantic States Legal Foundation, Inc v. Eastman Kodak Co., 933 F.2d 124 (2d Cir. 1991) 3
Baumgarten v. Harrisburg Housing Authority, 21 F.3d 541 (3d Cir. 1994) 3
Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc., 138 F.3d 351 (8th Cir. 1998) 3
Department of Revenue v. Kurth Ranch, 511 U.S. 767 (1994) 5
Gwaltney of Smithfield, Ltd v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987) 1, 2
Hudson v. United States, 118 S. Ct. 488 (1997) 4
Lewis v. Continental Bank Corp., 494 U.S. 472 (1990) 5, 6
Little Rock School District v. Pulaski County Special School District, 17 F.3d 260 (8th Cir. 1994) 3
Pembroke v. Wood County, 981 F.2d 225 (5th Cir. 1993), certiorari denied, 508 U.S. 973 (1993) 3
S-1 & S-2 v. State Board of Education, 21 F.3d 49 (4th Cir. 1994) 2
San Francisco Baykeeper v. Vallejo Sanitation and Flood Control District, E.D. Cal., No. Civ-5-96 1554 DFL 2
Shepard v. Taylor, 556 F.2d 648 (2d Cir. 1977) 5
Steel Co. v. Citizens for a Better Environment, 118 S. Ct. 1003 (1998) 2, 5
Tull v. United States, 481 U.S. 412 (1987) 4
United States Environmental Protection Agency v. City of Green Forest, 921 F.2d 1394 (8th Cir. 1990) 3

United States v. Pleasant, 730 F.2d 657 (11th Cir. 1984), certiorari denied, 469 U.S. 869 (1984) 5
Zinn by Blankenship v. Shalala, 35 F.3d 273 (7th Cir. 1994) 3

REASONS FOR GRANTING THE PETITION

1. The petition (pp. 8-13) showed that the decision of the court below is directly inconsistent with this Court's decision in Gwaltney of Smithfield, Ltd v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987). In both cases, the district court had not granted injunctive relief and this issue had not been appealed. As a result, the only remaining issue was the imposition of civil penalties. In Gwaltney, even though all violations had ceased before the complaint was filed, after specifically discussing mootness, this Court remanded the case for the courts below to consider whether there was a risk of continuing violations when the complaint was filed and therefore whether civil penalties could be imposed. 484 U.S. at 67. In sharp contrast, in the present case, the court of appeals held that the fact plaintiffs' claim for injunctive relief was no longer in the case automatically made the case moot even though there was not only a risk of continuing violations but actual post-complaint violations.

As plaintiffs noted in the petition (pp. 10-11), the court of appeals did not discuss this Court's decision in Gwaltney even though plaintiffs had demonstrated that the present case was stronger than Gwaltney. Laidlaw does discuss Gwaltney (Laidlaw Opp. 9-10) and states, based on it, that "[t]his Court must have envisioned the scenario where the citizen suit would cease to be a valid case or controversy under the Constitution and would be dismissed accordingly" (id., p. 10). However, this is precisely the point. This Court in Gwaltney did contemplate situations where citizen suits under the Clean Water Act would be moot but plainly decided that the case before it was not moot. Since the facts here are even less supportive of mootness, the court of appeals' decision is directly inconsistent with Gwaltney. Laidlaw, like the court of appeals, has entirely failed to show

any distinction between the two cases. This is not surprising since no distinction exists.

Plaintiffs note that EPA fully supports plaintiffs' position on the issue of standing in the present case. We have attached the Brief of the United States in San Francisco Baykeeper v. Vallejo Sanitation and Flood Control District, E.D. Cal., No. Civ-5-96 1554 DFL, which is a similar citizen suit under the Clean Water Act. There, EPA stated that Laidlaw was "wrongly decided" (App. 25a, n. 9), and presented a detailed argument which is inconsistent with the court of appeals' application of Steel Co. in the present case (App. 1-31).

2. Plaintiffs showed in the petition (pp. 20-21, 24) that the decision below rejecting an award of attorneys' fees is directly in conflict with this Court's dictum in Gwaltney that citizen plaintiffs in suits under the Clean Water Act are entitled to attorneys' fees when an illegal discharger brings itself into compliance (484 U.S. at 67, n. 6) and with decisions of nine other circuits holding that fees are payable under fee-shifting statutes when the suit has led to the plaintiffs obtaining a significant part of the relief requested. In response, Laidlaw entirely ignores this Court's dictum in Gwaltney. As to the conflict in circuits, Laidlaw says (Laidlaw Opp. 13):

> First, the issue of mootness was not even involved in seven of the ten cases. Second, in the remaining cases, voluntary action by one of the parties or action of a state environmental agency resulted in the dismissal of the action as mooted. Courts in none of the ten decisions were faced with facts where a plaintiff lacked standing to prosecute a citizen suit because the relief requested could not redress the

injury plaintiff had allegedly suffered.

Laidlaw's response to the conflict in circuits is entirely unpersuasive. First, the decision below was based on the Fourth Circuit's earlier decision in S-1 & S-2 v. State Board of Education, 21 F.3d 49 (4th Cir. 1994) (en banc). Pet. App. 9a, n. 5. S-1 and S-2 involved mootness. 21 F.3d at 51. Moreover, in S-1 and S-2, the Fourth Circuit expressly rejected three of the decisions on which plaintiffs here relied to show a conflict of circuits. 6 F.3d at 169, n. 2 (adopted as en banc decision, 21 F.3d at 51).

Second, five of the cases relied on by plaintiffs were dismissed as moot. Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc., 138 F.3d 351, 357 (8th Cir. 1998) (plaintiffs in Clean Water Act suit entitled to fees if case has become moot because their suit resulted in compliance); Zinn by Blankenship v. Shalala, 35 F.3d 273, 274 (7th Cir. 1994)(awarding fees where "plaintiffs obtain the relief they seek through defendants' voluntary action" (id. at 276)); Baumgarten v. Harrisburg Housing Authority, 21 F.3d 541, 544 (3d Cir. 1994)(case dismissed because defendants' action met all of plaintiffs' demands); Little Rock School District v. Pulaski County Special School District, 17 F.3d 260, 263 (8th Cir. 1994) (plaintiffs entitled to fees when defendants' voluntary actions mooted the claim); Pembroke v. Wood County, 981 F.2d 225, 228, 231 (5th Cir. 1993), certiorari denied, 508 U.S. 973 (1993) (plaintiffs entitled to fees where case has become moot because of the litigation). Accord Atlantic States Legal Foundation, Inc v. Eastman Kodak Co., 933 F.2d 124, 128 (2d Cir. 1991) (citizen plaintiffs in Clean Water Act suit entitled to attorneys' fees even if case is dismissed as moot if compliance has resulted from the plaintiffs' suit); United States Environmental Protection Agency v. City of Green Forest, 921 F.2d 1394, 1402 (8th

Cir. 1990) (citizen plaintiffs entitled to fees in Clean Water Act suit where their action was barred by EPA action but citizens were catalyst for EPA action). As the Seventh Circuit has noted, the Fourth Circuit stands "alone." Zinn by Blankenship v. Shalala, supra, 35 F.2d at 275. See also Baumgarten v. Harrisburg Housing Authority, supra, 21 F.3d at 549 (Fourth Circuit "held otherwise" then four other circuits).

These cases, which held that plaintiffs are entitled to attorneys' fees when the litigation has become moot because the plaintiffs obtained the relief sought in the litigation, are directly contrary to the decision below. The determination of mootness in those cases necessarily meant that the plaintiffs could no longer obtain redress of the relief requested. Nonetheless, the courts of appeals upheld the award of attorneys' fees.

3. Laidlaw suggests that the case is moot because it has shut down its incinerator since the court of appeals issued its decision. Def. Opp. 1, n. 1, 10. However, Laidlaw has submitted no affidavit or other evidence to support the bare statements in its brief or any indication whether the shut down is temporary or permanent. Plaintiffs have ascertained that Laidlaw has not taken any action to terminate the NPDES permit. App. 33a. Since Laidlaw's NPDES permit is still in effect, it may discharge in the future whenever it cares to do so.

Moreover, Laidlaw filed a proposed order in the state court which was hearing a challenge to Laidlaw's permit for operation of the incinerator in November 1998, after the incinerator shut down. In that order, Laidlaw asked that issuance of the permit be affirmed and gave no indication that the incinerator would not be operated. Subsequently on

November 23, 1998, the court issued virtually the identical order. Thus, Laidlaw has the right to continue to operate the incinerator.

In any event, the shut down of the facility, even if it were permanent, would not moot the case. Laidlaw/Safety-Kleen[1/] has at least 16 other NPDES permitted facilities. Friends of the Earth and Sierra Club have members who use the waters affected by Laidlaw/Safety-Kleen's discharges from some of these facilities and their use and enjoyment of these waters is adversely affected by illegal discharges from these facilities. See App. 33a.

The imposition of civil penalties in this case will continue to redress the injuries of plaintiffs and their members. As we showed in the petition (p. 15), both this Court and Congress have specifically found that penalties under the Clean Water Act deter violations. Tull v. United States, 481 U.S. 412, 422 (1987) ("Congress wanted the district court to consider the need for retribution and deterrence * * * when it imposed civil penalties" under the Clean Water Act"). See also Hudson v. United States, 118 S. Ct. 488, 494 (1997)("All civil penalties have some deterrent effect"); Department of Revenue v. Kurth Ranch, 511 U.S. 767, 778 (1994)("civil penalties * * * deter certain behavior").

In Steel Co. v. Citizens for a Better Environment, 118 S. Ct. 1003 (1998), this Court held that civil penalties did not satisfy redressability in a case where the defendant was not violating the statute at the time of the complaint and there was no allegation in the complaint of continuing violation.

1/Laidlaw acquired Safety-Kleen in April 1998 and then changed its own name to Safety-Kleen. Def. Opp. ii.

Id. at 1017-1018. In analyzing the redressability issue relating to civil penalties, the Court emphasized that the penalties were paid to the U.S. Treasury rather than the plaintiff. Id. at 1018. This analysis suggests that general deterrence, the effect of the imposition of a civil penalty on other dischargers, does not support redressability. See also id. at 1019. However, in view of this Court's emphasis on the fact that Steel Co. involved only initial standing and not mootness after initial standing had been shown (id. at 1019-1020), it is not clear whether this determination affects the present case.

In any event, even if Steel Co. establishes that general deterrence does not satisfy the requirement of redressability for purposes of mootness, the imposition of a civil penalty in this case constitutes specific deterrence. Specific deterrence involves the imposition of civil penalties which would affect the conduct of the defendant itself. United States v. Pleasant, 730 F.2d 657, 662 (11th Cir. 1984), certiorari denied, 469 U.S. 869 (1984); Shepard v. Taylor, 556 F.2d 648, 653 (2d Cir. 1977). Since Laidlaw/Safety-Kleen has other facilities where plaintiffs' members are injured by illegal discharges, the imposition of a civil penalty in this case will redress harm to plaintiffs even if the South Carolina incinerator were permanently shut down.

In short, this case continues to present the issues decided by the court of appeals. As the petition for a writ of certiorari shows, the court of appeals' decision presents extremely important issues involving conflicts with decisions of this Court and numerous courts of appeals. The shut down of Laidlaw's facility provides no support for denying the writ.

Even if the shut down of the facility had some effect on whether this Court should grant certiorari concerning the court of appeals' dismissal of the case on the ground of mootness, it clearly has no effect on the denial of attorneys' fees by the court of appeals. The denial of attorneys' fees involves whether, when a lawsuit has been properly filed and a substantial portion of the relief requested has been obtained, attorneys' fees may be awarded when the case becomes moot. Thus, the attorneys' fees issue assumes arguendo that the dismissal of the case on the ground of mootness was correct. Laidlaw's new reason for claiming mootness is therefore irrelevant.

Respectfully submitted,

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APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

SAN FRANCISCO BAYKEEPER, a non-profit corporation, Plaintiff, v. VALLEJO SANITATION AND FLOOD CONTROL DISTRICT, Defendant.	No. CIV-S-96 1554 DFL Hearing Date: January 15, 1999 Time: 10:00 a.m. Dept:Courtroom 3 Trial Date: October 25, 1999

BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN RESPONSE TO VALLEJO'S MOTION TO DISMISS PLAINTIFF'S CIVIL PENALTY CLAIMS

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ISSUE PRESENTED 1

INTERESTS OF THE UNITED STATES 1

FACTUAL BACKGROUND 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

Vallejo's Argument Ignores *Gwaltney* and Other Supreme Court Cases 4

Remedies that Specifically Deter Noncompliance Are Sufficient and Cognizable Redress for Article III Standing Purposes 6

Civil Penalties Payable to the Treasury Provide Article III Redress for Continuing or Imminent Future Violations by Specifically Deterring Future Noncompliance 9

The Two Other Supreme Court Cases Cited by Vallejo Are Inapposite to the Specific Deterrent Redress of Civil Penalties 14

CONCLUSION 16

TABLE OF AUTHORITIES

FEDERAL CASES

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) . 11
Bell v. Hood, 327 U.S. 678 (1946) 11
Bennett v. Spear, 117 S. Ct. 1154 (1997) 10, 11
Binderup v. Pathe Exchange, Inc., 263 U.S. 291 (1923) 11
Cardinal Chemical Co. v. Morton International, Inc., 508 U.S. 83 (1993) 3
Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd., 890 F.2d 690 (4th Cir. 1989) 5
City of Los Angeles v. Lyons, 461 U.S. 95 (1983) . . . 10
City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982) 3, 11
United States v. Concentrated Phosphate Export Association, 393 U.S. 199 (1968) 11
County of Riverside v. McLaughlin, 500 U.S. 44 (1991) 3
Department of Revenue v. Kurth Ranch, 511 U.S. 767 (1994) 9
Federal Election Commission v. Akins, 118 S. Ct. 1777 (1998) 16
Flast v. Cohen, 392 U.S. 83 (1968) 4

Friends of the Earth v. Laidlaw Envtl. Serv. (TOC), Inc., 149 F.3d 303 (4th Cir. 1998) 14
Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911) 13
Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, 484 U.S. 49 (1987) 3, 5, 12
Hudson v. United States, 118 S. Ct. 488 (1997) 10
In re Sealed Case No. 98-3077, 151 F.3d 1059 (D.C. Cir. 1998) 6
International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42 (1979) 7, 10

Lake Shore & Mich. S. Railway Co. v. Ohio, 173 U.S. 285 (1899) 13
Lamb v. Cramer, 285 U.S. 217 (1932) 7
Linda R. S. v. Richard D., 410 U.S. 614 (1973) . 15, 16
Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 3, 4
Middlesex County Sewage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) 5
Natural Resources Defense Council v. Southwest Marine, Inc.,CIV. No. 96 CV 1492-B (A.B.) (Nov. 19, 1998) . 14
Natural Resources Defense Council v. Texaco Refining, 2 F.3d 493 (3d Cir. 1993) 10
O'Shea v. Littleton, 414 U.S. 488 (1974) 10
Preisolate v. Interstate Commerce Commission, 494 U.S. 1 (1990) 12
Randolph v. Donaldson, 13 U.S. (9 Cranch.) 76 (1815) 13
Shepard v. Taylor, 556 F.2d 648 (2d Cir. 1977) 6
Sierra Club v. Electronic Controls Design, Inc., 909 F.2d 1350 (9th Cir. 1990) 5
Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976) 14, 15
Snead v. McColl, 53 U.S. (12 How.) 407 (1851) 13
Steel Company v. Citizens for a Better Environment, 118 S. Ct. 1003 (1998) . . . . . passim
Tull v. United States, 481 U.S. 412 (1987) 9, 12
United States v. Oregon State Medical Society, 343 U.S. 326 (1952) 6
United States v. Pleasant, 730 F.2d 657 (11th Cir. 1984) 6
United States v. W. T. Grant Co., 345 U.S. 629 (1953) 11
Walters v. National Association of Radiation Survivors, 473 U.S. 305 (1985) 12
Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) . 10

FEDERAL STATUTES

Clean Water Act, 33 U.S.C. § 1251 1
33 U.S.C. § 1365 . . . . . 1, 5, 11, 12
33 U.S.C. § 1319(d) 11, 12

LEGISLATIVE HISTORY

131 Cong. Rec. 34650 (Dec. 5, 1985) 2

Environment and Natural Resources Division of the Department of Justice: Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary, 104th Cong., 1st Sess. (1995) (committee print) 2

House Committee on Energy and Commerce, Superfund Amendments of 1985, H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. 5, (Nov. 12, 1985), reprinted in 1986 U.S.C.C.A.N. 3124 2

S. Rep. No. 228, 101st Cong., 1st Sess. (1989), reprinted in 1990 U.S.C.C.A.N. 3386 12

MISCELLANEOUS

Jeremy Bentham, The Principles of Morals and Legislation (Prometheus Books 1988) (originally published 1781) . 12

Dennis Epple & Michael Visscher, Environmental Pollution: Modeling, Occurrence, Detection, and Deterrence, 27 J. Law & Econ. 29 (Apr. 1984) 13

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Issue Presented

Whether the Article III standing doctrine precludes Congress from granting courts jurisdiction to assess civil monetary penalties, in Clean Water Act citizen suits, against a defendant who, at the time the complaint is filed, is violating or is imminently expected again to violate the Act.

Interests of the United States

The United States has the lead role, along with the states, in implementing and enforcing the Clean Water Act ("Act"), 33 U.S.C. § 1251 et seq. Section 505 of the Act also authorizes adversely affected private persons, or "citizens," to enforce many of the Act's requirements, and grants the district courts jurisdiction in citizen suits to issue injunctions and to assess civil monetary penalties payable to the United States. See 33 U.S.C. § 1365(a), (g). The Vallejo Sanitation and Flood Control District ("Vallejo") contends that Article III's "case" or "controversy" requirement bars the courts from exercising Section 505 civil penalty jurisdiction, however, because such penalties cannot, as a matter of law, redress any injury suffered by citizen plaintiffs. The United States files this amicus curiae brief to defend the constitutionality of the courts' statutory jurisdiction to assess, and citizen plaintiffs' standing to seek, civil monetary penalties.

The ability of citizen plaintiffs to enforce the Clean Water Act allows those individuals who are most directly injured by unlawful pollution — the people who live, work, and play downstream from illegal discharges — to protect their health and their environment. Citizen enforcement authority is important because resource

constraints do not allow the Government to pursue all violations that warrant enforcement. A citizen suit that is backed by the prospect of civil penalties provides a strong incentive for a defendant violator to comply quickly with the Act. For example, between January 20, 1993, and May 5, 1995, defendants in citizen enforcement suits that alleged Clean Water Act claims paid more than $3 million in civil penalties to the United States, as a result of judgments or settlements, and settlements in such suits resulted in almost an additional $10 million in payments to states.[1/] During this same period, settling defendants who were parties to consent decrees in seventy-eight Clean Water Act citizen suits — and who faced or paid such penalties — agreed to fund at least $61 million in quantifiable injunctive relief, and to undertake significant additional, unquantified injunctive relief, to resolve and address alleged Clean Water Act violations. Id. As Congress recognized in enacting subsequent citizen enforcement provisions, citizen suits are critical to filling the gap between the number of significant environmental violations and the limited governmental enforcement resources available to address such violations. See, e.g., 131 Cong. Rec. 34650 (Dec. 5, 1985) (statement of Rep. Glickman) ("In view of the government's limited and overburdened enforcement authority, citizen suits are essential to assure compliance with the law."); House Committee on Energy and Commerce, Superfund

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1/See Environment and Natural Resources Division of the Department of Justice: Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary, 104th Cong., 1st Sess. 296-302 (1995) (committee print) (letter from Kent Markus, Acting Assistant Attorney General, to Rep. Charles T. Canady, Chairman (May 5, 1995)).

Amendments of 1985, H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. 5, at 83 (Nov. 12, 1985), reprinted in 1986 U.S.C.C.A.N. 3124, 3206 ("Citizen suits provisions [sic] have been found to be helpful both in encouraging diligent Federal enforcement of environmental statutes and in locating and taking actions against violators of these Acts.").

Factual Background

San Francisco BayKeeper ("BayKeeper") brought this Clean Water Act citizen suit against the Vallejo Sanitation and Flood Control District ("Vallejo") for unlawfully discharging raw sewage and other pollutants into the San Pablo Bay and San Francisco Bay Estuary at Mare Island Strait and Carquinez Strait, and by unlawfully failing to report its discharges as required by its permit. BayKeeper sought injunctive relief, civil penalties, and fees and costs. Vallejo moved for summary judgment on standing, and the parties filed cross-motions for summary judgment on liability. On December 11, 1997, this Court held that BayKeeper had introduced sufficient evidence of standing to go to trial on that issue.[2/] See Mem. of Op. and Order 10 (Dec. 11, 1997).

On May 27, 1998, this Court granted summary judgment for BayKeeper on Vallejo's liability. This Court held that — both before and after BayKeeper filed its complaint — Vallejo was in violation of its Clean Water Act permit requirements concerning chlorine residual, total

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2/This Court granted summary judgment on standing against an individual plaintiff, Michael Lozeau. See Mem. of Op. and Order 10 (Dec. 11, 1997).

suspended solids, copper, settleable matter, median and total coliform, overflow and bypass, and reporting. See Mem. of Op. and Order 10-17 (May 27, 1998).[3]/

3/This Court has held that Vallejo continued to violate the Clean Water Act after the complaint was filed, and Vallejo's brief does not assert that its violations have ceased. The United States is unaware of evidence that "it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 66 (1987) (emphasis in original; internal quote marks omitted). Nevertheless, in the United States' present posture as amicus curiae, the United States takes no position on Vallejo's current compliance. Vallejo's argument appears to be that its present compliance (or noncompliance) status is irrelevant because the Article III standing doctrine bars civil penalties in all citizen suits, even if the defendant continues to violate the Clean Water Act through final judgment. Thus, Vallejo challenges only BayKeeper's initial standing; Vallejo does not argue that it has mooted this case by ceasing its violations, and does not even attempt to demonstrate that its violations cannot reasonably be expected to recur. Compare generally, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 569 n.4 (1992) (holding, in a standing case, that "jurisdiction is to be assessed under the facts existing when the complaint is filed"); County of Riverside v. McLaughlin, 500 U.S. 44, 50-52 (1991) (holding that the plaintiff had standing based on the facts at the time of the complaint, even though post-complaint developments mooted the case); Gwaltney of Smithfield v. Chesapeake Bay Found., 484 U.S. 49, 69 (1987) (Scalia, J., concurring in part) (stating that standing is determined based on the facts at the time of the complaint); with, e.g., Cardinal Chemical Co. v. Morton Int'l, Inc., 508

Summary of Argument

Consistent with Article III standing doctrine, courts may assess civil monetary penalties in citizen suits, where such penalties will tend specifically to deter noncompliance by a defendant who, when the complaint is filed, is violating or is imminently expected again to violate the Clean Water Act. Last term, Steel Company v. Citizens for a Better Environment, 118 S. Ct. 1003 (1998), reaffirmed that specific deterrence of a defendant is cognizable redress under Article III's standing test, and that remedies designed specifically to deter ongoing or imminent future violations of the law by a defendant satisfy the redressability requirement. Moreover, the Supreme Court repeatedly has recognized — in contexts ranging from application of the Clean Water Act to imposition of civil contempt sanctions and punitive damages — that civil penalties coerce compliance with the law by a defendant through specific deterrence. Thus, far from supporting Vallejo's facial challenge, Steel Company teaches only that civil penalties payable to the Treasury cannot redress citizens' injuries from "purely past," nonrecurring violations. Here, where the Court has found that the defendant's violations continued at the time of the complaint, civil penalties can cognizably coerce compliance — redressing the plaintiff's injuries from the defendant's ongoing and future illegal discharges — and Article III

U.S. 83, 98 (1993) (stating that the burden shifts to the defendant to prove mootness); Gwaltney, 484 U.S. at 66 (stating that voluntary cessation of illegal activity moots a case only where the defendant proves that the wrong cannot reasonably be expected to recur); City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982) (same).

standing doctrine poses no barrier to the Court's assessment of civil penalties.

Argument

1. Vallejo's Argument Ignores *Gwaltney* and Other Supreme Court Cases. — Article III restricts the judicial power of federal courts to "cases" or "controversies." This requirement serves to "limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process" and also "to assure that the federal courts will not intrude into areas committed to the other branches of government." Flast v. Cohen, 392 U.S. 83, 95 (1968). One aspect of the case-or-controversy requirement is the standing doctrine, which requires a plaintiff who seeks to invoke the jurisdiction of a federal court to show (1) either a present or threatened future "injury in fact" that (2) is "causal[ly] connect[ed]" to the challenged conduct and that (3) "likely" would be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (emphasis omitted; internal quote marks omitted).

Vallejo argues, based on a misreading of Steel Company v. Citizens for a Better Environment, 118 S. Ct. 1003 (1998), that Article III's standing doctrine prohibits courts from assessing civil penalties in citizen suits. In Vallejo's view, penalties payable to the Treasury can never redress any injury suffered by a citizen plaintiff. Notwithstanding that Congress provided that the district courts "shall have jurisdiction" in Clean Water Act citizen suits "to enforce" the Act and "to apply any appropriate civil penalties," 33 U.S.C. § 1365(a) (emphasis added),

Vallejo contends that Article III bars the courts from exercising such jurisdiction.

Given the Supreme Court's repeated observations that Clean Water Act citizen suitors may seek civil penalties payable to the Treasury, Vallejo's proposed result would be, to say the least, surprising. See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 53 (1987); Middlesex County Sewage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 14 n.25 (1981); accord Sierra Club v. Electronic Controls Design, Inc., 909 F.2d 1350, 1352, 1354 (9th Cir. 1990). Indeed, in Gwaltney, the Supreme Court remanded a Clean Water Act citizen enforcement action to allow the citizen plaintiffs to demonstrate a good faith basis for their allegation that the defendant was liable for violations continuing at the time of the complaint — despite the fact that the only relief the plaintiffs still sought was civil penalties. Compare 484 U.S. at 67 with Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd., 890 F.2d 690, 692 & n. 2 (4th Cir. 1989) (noting that the district court had assessed penalties but denied an injunction, and that the defendant only had appealed). Thus, under Vallejo's reading of Steel Company, Gwaltney necessarily would have been wrongly decided. But Steel Company itself never suggested that it overruled Gwaltney.

Vallejo's mistake is to conflate the Supreme Court's discussion of general deterrence, which cannot satisfy the standing doctrine's redressability test, with the Court's discussion of specific deterrence, which can.[4]/ As shown

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4/Specific deterrence" generally is used to mean deterrence of future misconduct by the same offender, while "general

below, civil penalties can redress a plaintiff's injuries from a defendant's ongoing and future violations by coercing the defendant's compliance — that is, through specific deterrence. Vallejo's contrary argument rests on one or both of two mistaken premises: Either Vallejo assumes that Article III's redressability test is not satisfied by remedies that specifically deter a defendant's ongoing or future violations, or Vallejo assumes that the assessment of civil penalties cannot deter a defendant from committing future violations. The first premise — that specific deterrence is not cognizable under Article III — is inconsistent with a vast and unquestioned body of Supreme Court jurisprudence, including Steel Company itself. See Argument 2, infra. The second premise — that civil penalties cannot specifically deter a defendant from future violations — is unsupported by Steel Company and contrary to numerous Supreme Court decisions. See Argument 3, infra.

2. Remedies that Specifically Deter Noncompliance Are Sufficient and Cognizable Redress for Article III Standing Purposes. — Remedies designed to coerce compliance by a defendant who is in continuing or imminent future violation of the law — that is, remedies that work "specific deterrence" — unquestionably satisfy the redressability prong of Article III's standing doctrine where a plaintiff is injured by a defendant's ongoing or prospective violations. After all, coercion of compliance is

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deterrence" generally is used to mean deterrence of future misconduct by others. See, e.g., United States v. Pleasant, 730 F.2d 657, 662 (11th Cir. 1984), cert. denied, 469 U.S. 869 (1984); Shepard v. Taylor, 556 F.2d 648, 653 (2d Cir. 1977).

the "sole function" of injunctive relief, United States v. Oregon State Medical Soc'y, 343 U.S. 326, 333 (1952), and no one questions private litigants' standing to seek such relief, see, e.g., Steel Co., 118 S. Ct. at 1019. Similarly, coercion of compliance is a principal purpose of civil contempt sanctions, and there can be no doubt that private litigants have standing to seek such sanctions. Cf., e.g., Lamb v. Cramer, 285 U.S. 217, 219 (1932) (holding that a private litigant may initiate civil contempt proceedings to secure compliance with a court order); In re Sealed Case No. 98-3077, 151 F.3d 1059, 1069 (D.C. Cir. 1998) (holding that a civil contempt proceeding "may be initiated by a private plaintiff"). Likewise, private litigants have always been thought to have standing to seek punitive damages, which "are not compensation for injury" but instead are "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." International Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 48 (1979) (internal quote marks omitted; emphasis added).

Steel Company reaffirmed that specific deterrence of a defendant's future violations satisfies the Article III standing doctrine's redressability requirement. Steel Company decided the narrow question whether a citizen plaintiff had standing to sue "for purely past violations," where the plaintiff alleged no prospect that the defendant would violate the law again. 118 S. Ct. at 1008, 1019. The plaintiff lacked standing because the relief that it sought — including civil monetary penalties — would not redress its injuries from those purely past violations. Id. at 1018-19. But, in discussing injunctive relief, the Court made clear that a remedy designed to specifically deter a defendant from anticipated future noncompliance does provide adequate Article III redress:

> The remaining relief respondent seeks *** is injunctive in nature. It cannot conceivably remedy any past wrong but is aimed at deterring petitioner from violating EPCRA in the future. The latter objective can of course be "remedial" for Article III purposes, when threatened injury is one of the gravamens of the complaint. If respondent had alleged a continuing violation or the imminence of a future violation, the injunctive relief requested would remedy that alleged harm. But there is no such allegation here — and on the facts of the case, there seems no basis for it. Nothing supports the requested injunctive relief except respondent's generalized interest in deterrence, which is insufficient for purposes of Article III.

Steel Co., 118 S. Ct. at 1019 (emphasis added). In this passage, the Court made clear that specific, but not general, deterrence is cognizable redress under the Article III standing doctrine. Although raised in the context of injunctive relief, the Court's reasoning applies equally to other types of relief that may be used specifically to deter a defendant's future noncompliance.

Notwithstanding Steel Company's explicit statement that specific deterrence is cognizable under Article III, Vallejo contends that the specific deterrent effect of civil penalties does not satisfy the Article III standing doctrine's redressability requirement. See Vallejo Mem. at 3 ("That the award of penalties might deter the defendant from future violations *** fell short of satisfying the test for standing" (emphasis added).). Vallejo rests its argument against specific deterrence on the Steel Company Court's rejection of general deterrence as a form of Article III redress. Vallejo points to a passage in which the Court

held that the possibility that civil penalties "will deter the risk of future harm" is not sufficient to satisfy Article III. 118 S. Ct. at 1018. The Court explained that:

> [S]uch a principle would make the redressability requirement vanish. By the mere bringing of the suit, every plaintiff demonstrates his belief that a favorable judgment will make him happier. But although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.

Id. at 1018-19 (emphasis in original).

In context, this passage restates only the unsurprising proposition that, absent any allegation of future violations by the defendant itself, a "generalized interest in deterrence *** is insufficient for purposes of Article III." Id. at 1019 (emphasis added). The passage can refer to nothing else, for the Steel Company plaintiff sought only penalties for "purely past violations." Id. at 1008. Such penalties could not coerce compliance by the defendant because there was nothing to coerce: The Steel Company plaintiff conceded that the defendant was in compliance and would remain so. Penalties for purely past violations could at most have had some general deterrent impact on possible future violations by other, unknown, unrelated persons who might never cause the plaintiffs any injury. Faced with those facts, the Court affirmed that such general deterrence is not enough, that the "great comfort" that a plaintiff may receive from knowing that

"the nation's laws are faithfully enforced," without redress of a particularized injury to the plaintiff, "is not an acceptable Article III injury." Id. at 1019.

Thus, Vallejo mistakes Steel Company's terse discussion of general deterrence for a holding concerning specific deterrence, but ignores Steel Company's own discussion of specific deterrence, just one opinion page later. In this case, the plaintiff does not seek a generalized pronouncement about the law; instead, it seeks an order assessing penalties to deter Vallejo from continuing to pollute waters that the plaintiff's members allegedly use. Far from supporting Vallejo's position, Steel Company reaffirms that such relief, "aimed at deterring [the defendant itself] from violating [the law] in the future," does provide a sufficient and cognizable Article III remedy. Id. at 1019. That must be the law, for if Article III barred courts from imposing remedies designed as specific deterrents, then the courts would lack jurisdiction also to impose injunctions and civil contempt sanctions. See supra.

3. Civil Penalties Payable to the Treasury Provide Article III Redress for Continuing or Imminent Future Violations by Specifically Deterring Future Noncompliance. — Given that Article III standing doctrine poses no jurisdictional barrier to remedies aimed at specifically deterring noncompliance by a defendant who is in violation at the time of the complaint, as Vallejo was, Vallejo must fall back on an argument that civil penalties do not specifically deter violations of the law. That counterintuitive suggestion fails for four independent reasons.

First, the Supreme Court itself has long recognized that the threat and assessment of civil monetary penalties, including Clean Water Act penalties, deters misconduct by persons who are or may be penalized. See, e.g., Department of Revenue v. Kurth Ranch, 511 U.S. 767, 778 (1994) (stating that "civil penalties *** deter certain behavior"); Tull v. United States, 481 U.S. 412, 422 (1987) (holding that "Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties" under the Clean Water Act (emphasis added)); Weinberger v. Romero-Barcelo, 456 U.S. 305, 314 (1982) ("An injunction is not the only means of ensuring compliance. The [Clean Water Act] itself, for example, provides for fines and criminal penalties."); Hudson v. United States, 118 S. Ct. 488, 494 (1997) ("[A]ll civil penalties have some deterrent effect *** ."); Natural Resources Defense Council v. Texaco Refining, 2 F.3d 493, 503 n. 9 (3d Cir. 1993) ("[T]he imposition of penalties significantly enhances the deterrent effect of a citizen suit."); cf. O'Shea v. Littleton, 414 U.S. 488, 503 (1974) (holding that the threat of fines and imprisonment under a criminal statute will exercise a deterrent effect, even absent an injunction).[5]/

5/The Supreme Court also has opined that compensatory damages, like an injunction, deter future violations by a defendant. See City of Los Angeles v. Lyons, 461 U.S. 95, 112-13 (1983). Similarly, the Supreme Court has observed that punitive damages "deter" future misconduct. Foust, 442 U.S. at 48 (internal quote marks omitted). From the defendant's perspective — the perspective that matters for purpose of determining whether the defendant will be deterred — there is little reason to think that paying damages

In Bennett v. Spear, 117 S. Ct. 1154 (1997), for example, the Court found that the citizen plaintiff had standing based in part on the specific deterrent effect that the threat of civil monetary penalties would have on the party that injured the plaintiff. The plaintiff expected to be injured by a Bureau of Reclamation's (BOR) decision to restrict certain water uses. However, instead of challenging the BOR's water use decision directly, the plaintiff challenged a Fish and Wildlife Service (FWS) "biological opinion" that had informed the BOR's decision. The Government argued that the plaintiff lacked standing to challenge the FWS opinion because the FWS had not harmed the plaintiff, the FWS opinion did not bind the BOR, and a successful challenge to the FWS opinion would therefore not redress the plaintiff's injury. Id. at 1163-64. The Court disagreed, reasoning that the BOR would be coerced to follow the FWS's views by the threat of civil and criminal sanctions under the Endangered Species Act. Id. Although BOR could legally ignore the FWS opinion, and although no enforcement action was threatened or pending against BOR, the Court noted that compliance by the BOR with the FWS opinion would immunize the BOR and its employees from Endangered Species Act penalties for possible future violations. Id. at 1163-65. Thus, the Spear Court found that a successful challenge to the FWS opinion would redress the plaintiff's injury from the BOR decision because the BOR was likely to follow FWS's views to avoid the possibility of penalties

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would have more of a deterrent effect than paying civil penalties. Thus, the Court's observations that damages deter future misconduct support the conclusion reached by the many cases that say that civil penalties deter future misconduct.

in the future. If an indirect possibility of penalties for unknown future violations is sufficiently coercive to satisfy Article III's redressabilty test, as in Spear, then surely the coercive effect of civil penalties assessed directly against the defendant for each day of each violation of the Clean Water Act also is sufficiently coercive to satisfy the redressability test.[6]/

Second, there is no doubt that the Article III redressability requirement is satisfied by an injunction to deter future noncompliance, see Steel Company, 118 S. Ct. at 1019, yet the specific deterrent effect of an injunction depends largely on the threat of civil penalties that give such injunctions teeth. Indeed, at the initiation of a citizen suit, the possibility of civil penalties may be a far more powerful specific deterrent than the possibility of an injunction: The defendant accrues additional civil penalty

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6/Steel Company reaffirmed that Article III redressability turns on the relief the plaintiff requests — unless the request is wholly frivolous — even if the court ultimately denies the relief on the merits. 118 S. Ct. at 1010. The subsequent question of what relief is appropriate "relat[es] to the exercise rather than the existence of judicial power." City of Mesquite, 455 U.S. at 289; see also United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968); United States v. W.T. Grant Co., 345 U.S. 629, 633-34, 635-36 (1953); Bell v. Hood, 327 U.S. 678, 682-83 (1946); Binderup v. Pathe Exchange, Inc., 263 U.S. 291, 305-06 (1923). Thus, if BayKeeper in good faith sought civil penalties that, if assessed, would by likely to deter ongoing or future noncompliance by Vallejo, that specific deterrent effect would satisfy the standing doctrine's redressability test, even if the Court ultimately did not assesses penalties.

liability for each day of violation until it comes into compliance. 33 U.S.C. §§ 1365(a), 1319(d). By contrast, contempt sanctions cannot be imposed until after an injunction is issued and then violated. As the Supreme Court has explained, "[i]f violators faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality." Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975).

Third, Congress plainly believes that civil penalties do deter violations of the law, and Congress' factual conclusions are entitled to substantial deference. See, e.g., Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 17 (1990); Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 330 n.12 (1985). As Gwaltney noted, the legislative history of the Clean Water Act makes clear that Congress authorized citizen suits precisely to allow private persons to abate violations. 484 U.S. at 61. In furtherance of this specific deterrent goal, Congress authorized courts in citizen suits to grant injunctions and to assess civil penalties under the Act's general civil penalties provision. 33 U.S.C. §§ 1365(a), 1319(d). "Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties" under this general civil penalty provision. Tull v. United States, 481 U.S. 412, 422-23 (1987) (emphasis added; citing 123 Cong. Rec. 39191 (1977)). Given Congress' purpose of abatement, Congress must have believed that the threat of penalties — and the imposition of civil penalties in the event of actual non-compliance — would specifically deter violations of the law.[7]/ See also

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7/Political philosophers have recognized as least since the Framer's era that monetary punishments deter violations of

S. Rep. No. 228, 101st Cong., 1st Sess. 373 (1989), reprinted in 1990 U.S.C.C.A.N. 3386, 3756 (stating that, in citizen suits under the Clean Air Act, "assessment of civil penalties for violations *** [is] necessary for deterrence, restitution, and retribution").

Fourth, as a factual matter, penalties have been empirically demonstrated to deter, so there is little warrant for Vallejo's proposed per se legal conclusion that civil penalties do not coerce more rapid compliance. For example, one study of actual enforcement of federal water pollution control laws found that enforcement efforts under a statute providing for civil penalties do deter water polluters. See Dennis Epple & Michael Visscher, "Environmental Pollution: Modeling Occurrence, Detection, and Deterrence," 27 J. Law & Econ. 29, 56 (Apr. 1984).

Nothing in Steel Company suggests that the Court there considered the specific deterrent effect of civil monetary penalties on future noncompliance, let alone that the Court overruled the Court's repeated past statements that civil penalties do deter, or created a per se rule that

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the law by removing the incentives for noncompliance. See, e.g., Jeremy Bentham, The Principles of Morals and Legislation 147 (Prometheus Books 1988) (originally published 1781) ("The temptation, then, may be said to be strong, when the pleasure or advantage to be got from the crime is such as in the eyes of the offender must appear great in comparison of the trouble and danger that appear to him to accompany the enterprise *** ."); id. at 189-91 (recognizing that "pecuniary" punishments can be set at a level designed to remove the incentive to commit misdeeds).

civil penalties never have a specific deterrent effect. On Steel Company's facts, the question of whether civil monetary penalties specifically deter was not presented. Given the overwhelming support for civil penalties' deterrent effect — and given Steel Company's own statement that specific deterrent relief satisfies the Article III redressability requirement — Article III poses no barrier to Congress' grant of jurisdiction to assess penalties in citizen suits to specifically deter noncompliance by the defendant.[8]/

8/A claim for civil monetary penalties to coerce compliance is a "case[] or controversy[] of the sort traditionally amendable to and resolved by the judicial process." See Steel Co., 118 S. Ct. at 1016. Laws allowing private persons to recover civil penalties for the government are hardly novel to this century. See Lake Shore & Mich. S. Ry. Co. v. Ohio, 173 U.S. 285, 286 (1899) (discussing an 1889 state law that authorized "any person" to sue persons who violate a state rail law to collect civil monetary penalties payable to "the general fund of the county"). Indeed, courts have always been thought to have Article III jurisdiction to incarcerate condemners in civil contempt proceedings initiated by one private party against another, because incarceration coerces compliance. See, e.g., Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 442, 444-45 (1911) (stating that imprisonment for civil contempt "is intended to be remedial by coercing the defendant to do what he has refused to do" and that "[p]roceedings for civil contempt are between the original parties"). Likewise, in the Framers' era, creditors apparently had a justiciable interest in having their debtors imprisoned. Cf. Randolph v. Donaldson, 13 U.S. (9 Cranch.) 76, 84-86 (1815) (discussing a federal law under which a federal marshal could be liable to a private creditor for the

4. The Two Other Supreme Court Cases Cited by Vallejo Are Inapposite to the Specific Deterrent Redress of Civil Penalties. — Despite the fact that Steel Company involved only past violations, Vallejo argues that Steel Company prohibits civil monetary penalties for ongoing violations because "the [Steel Company] Court relied on two cases *** where the alleged violations and resulting harms were ongoing."[9]/ Because neither of these other

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escape of a debtor who was in the marshal's custody); Snead v. McCoull, 53 U.S. (12 How.) 407, 410 (1851) (noting that the debtor was incarcerated upon a writ of capias ad satisfaciendum under an 1800 federal law); Sir William Holdsworth, 8 A History of English Law 231 (2d ed. 1937) (reprinted 1966) (explaining that, at common law, a writ of capias ad satisfaciendum allowed a creditor to "take his debtor's body in execution"). Certainly such incarceration and imprisonment has a greater element of retribution than does the assessment of monetary civil penalties, and yet private litigants could seek such sanctions, because they coerce compliance.

9/Vallejo also relies on Friends of the Earth v. Laidlaw Envtl. Serv. (TOC), Inc., 149 F.3d 303 (4th Cir. 1998), petition for cert. filed, No. 98-822 (Nov. 9, 1998), and San Francisco BayKeeper v. Cargill Salt, No. C 96-02161 CAL (N.D. Cal. Nov. 19, 1988) (unpublished order). As noted in a recent decision from the Southern District of California, Laidlaw involved violations that had ceased, and is factually dissimilar from this case. See Op. and Order Denying Mot. to Preclude Civil Penalties 2, Natural Resources Defense Council v. Southwest Marine, Inc., Civ. No. 96 CV 1492-B (AJB) (Nov. 19, 1998). In any event, based on the arguments presented in this brief, the United States respectfully suggests that both cases were wrongly decided.

cases involved claims for civil penalties, or even suits against the party that had injured the plaintiffs, both cases are inapposite.

In Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 32-33 (1976), several individuals who had been denied hospital service due to indigency, as well as several organizations that represented such individuals, challenged an Internal Revenue Service (IRS) ruling that, according to the plaintiffs, unlawfully encouraged some hospitals to deny benefits to indigents. The plaintiffs did not sue the hospitals that had denied them service, however. Id. at 41. Thus, Simon did not involve specific deterrence at all, but instead raised a question whether an IRS ruling caused the plaintiffs' injuries by encouraging unlawful conduct. Faced with a rather tenuous nexus between the alleged violation and claimed injury, the Court held that the plaintiffs lacked standing. "[I]t is purely speculative whether the denials of service" were caused by the IRS, the Court said, id. at 42-43, and therefore it was "equally speculative" whether a remand for the IRS to reconsider its ruling would lead to more hospital service for the plaintiffs, id. at 43. As with Steel Company, a ruling for the Simon plaintiffs would at most have served to "vindicat[e] the rule of law," Steel Co., 118 S. Ct. at 1018, because the plaintiffs suggested "no substantial likelihood that victory in this suit would result in" a benefit to the plaintiffs, Simon, 426 U.S. at 45-46. Here, by contrast, BayKeeper seeks to deter future unlawful (and injurious) discharges by asking this Court to assess civil monetary penalties directly against the violator.

In Linda R. S. v. Richard D., 410 U.S. 614, 614-15 (1973), the mother of an illegitimate child sued to enjoin discriminatory application of a state statute that

criminalized parents' willful neglect or nonsupport of their children. The state statute had been interpreted by the state courts to apply only to the parents of legitimate children, however, and to impose no duty on parents of illegitimates. Id. at 615. The plaintiff sought an injunction requiring the local district attorney to prosecute the father of her unsupported, illegitimate child. Id. at 616. The Court held that she lacked standing, because "in the unique context of a criminal statute, appellant has failed to allege a sufficient nexus between her injury and the government action which she attacks." Id. at 617-18.

Linda R. S. turned on the longstanding rule that "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." Id. at 619. The plaintiff sought an injunction against a defendant, the local district attorney, who had not directly caused the plaintiff any injury. Id. at 616. As Simon later explained, "[t]he principle of Linda R. S. * * * is that indirectness of injury, while not necessarily fatal to standing, may make it substantially more difficult to meet the minimum requirement of Art. III." 426 U.S. at 44-45 (internal quote marks omitted). The Court noted that "[t]he prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative," because the requested relief "would result only in the jailing of the child's father." 410 U.S. at 618. Given that the defendant had not directly caused the plaintiff's injuries, and in light of the "special status of criminal prosecutions in our system," the court declined to find standing. 410 U.S. at 619. For, "in American jurisprudence, at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." Id. The Court explicitly limited its holding to "the unique context of a

challenge to a criminal statute," however. Id. at 617. That holding is inapposite to a case, such as the present, where the plaintiff seeks civil penalties directly against the party that injured the plaintiff, to deter future violations by the defendant that would directly injure the plaintiff again.[10]/

10/Any extension of Linda R. S. to a civil enforcement proceeding also runs up against the Supreme Court's post-Steel Company decision in Federal Election Commission v. Akins, 118 S. Ct. 1777 (1998). The Akins Court held that a private citizen who sought information about AIPAC, a political action committee, had standing to challenge the Federal Election Commission's determination not to require AIPAC to comply with certain federal reporting requirements. The Akins plaintiffs sought a declaration that FEC's action was unlawful. Such a declaration might, or might not, have led to reporting by AIPAC, however. Even if on remand the FEC did require the information from AIPAC, AIPAC might not have complied and the FEC would have had to bring an enforcement action to get the information that the plaintiffs sought. Id. at 1786-87. Nevertheless, the Akins Court found standing, implicitly rejecting an argument in the Government's brief that the effect of possible future civil enforcement against AIPAC was too speculative to satisfy the redressability test. See Federal Election Commission, No. 96-1590, U.S. Br. at 29-31 (1997 WL 523890). In the present case, the actual imposition of civil penalties against Vallejo might be expected to have at least as immediate a coercive effect as the mere possibility of civil enforcement found sufficient for redressability in Akins.

Conclusion

For these reasons, Vallejo's motion to dismiss BayKeeper's claims for civil penalties should be denied.

Respectfully submitted,

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By: _____
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90-12-01140
December 11, 1998

CERTIFICATE OF SERVICE

I hereby certify that, on December 11, 1998, I caused a copy of the BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN RESPONSE TO DISTRICT'S MOTION TO DISMISS PLAINTIFF'S CIVIL PENALTY CLAIMS to be served by Federal Express, postage pre-paid, on:

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No. 98-822

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

FRIENDS OF THE EARTH, et al.,
Petitioners,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

AFFIDAVIT OF BRUCE J. TERRIS

I, Bruce J. Terris, do hereby affirm and state:

1. I am counsel for plaintiffs in the above-captioned case.

2. My staff has obtained the following information relating to the shut down of the incinerator of Laidlaw Environmental Services (TOC), Inc., in Roebuck, South Carolina and other facilities operated by Laidlaw:

(a) The incinerator was shut down in August 1998.

(b) The NPDES permit issued by the State of South Carolina for the discharge of pollutants by the incinerator has not been terminated or withdrawn.

(c) Laidlaw acquired Safety-Kleen in April 1998. Laidlaw changed its name to Safety-Kleen.

(d) Laidlaw/Safety-Kleen operates at least 16 other NPDES permitted facilities in Illinois, Louisiana, Kentucky, Missouri, New Jersey, Virginia and Texas.

(e) Plaintiffs Friends of the Earth and the Sierra Club have members who use the waters affected by Laidlaw/Safety-Kleen's discharges from some of these facilities and their use and enjoyment of these waters is adversely affected by illegal discharges from these facilities.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on January 19, 1999.

BRUCE J. TERRIS